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In The

Supreme Court of the United States

October Term, 1997

CITY OF CHICAGO,

Petitioner,

vs.

JESUS MORALES, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF CHICAGO ALLIANCE FOR NEIGHBORHOOD SAFETY, U.S. REPRESENTATIVE JESSE JACKSON, JR., COMMUNITY RENEWAL SOCIETY, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NATIONAL COUNCIL OF LA RAZA, MEXICAN-AMERICAN LEGAL DEFENSE FUND, CHICAGO COUNCIL OF LAWYERS, COOK COUNTY BAR ASSOCIATION, PUERTO RICAN BAR ASSOCIATION OF ILLINOIS, THE BLACK LEADERSHIP FORUM, INC., CHICAGO CONFERENCE OF BLACK LAWYERS AND CHICAGO COMMUNITY ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

(1) Whether ordinance against loitering "with no apparent purpose" is impermissibly vague on its face, when state supreme court has determined that City Council's legislative intent precludes a judicial construction narrowing or clarifying the law's terms.

(2) Whether ordinance requiring citizens to comply with a police officer's order to "disperse and remove themselves from the area" is impermissibly vague on its face, when neither the ordinance nor any implementing guidelines indicate the extent of the "area" that the citizen must leave or how long the citizen must remain away in order to avoid arrest.

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INTEREST OF AMICI CURIAE[1]

Amici are grass-roots membership groups, and other Chicago and national organizations dedicated to serving the needs of inner-city residents. *Amici*'s members live with the reality of gang violence and understand the need for thoughtful police initiatives, as well as the dangers to public safety and civil liberties that can result from insufficiently careful responses to public frustration, impatience and understandable demands for law and order.

The Chicago Alliance for Neighborhood Safety (CANS) has been one of the leading community organizations working to implement community policing at the grass-roots level, in direct partnership with the Chicago Police Department (CPD). CANS "worked for years to encourage the adoption of community policing in Chicago,"[2] and has played a major role in community policing initiatives, often under contract with the City and the U.S. Department of Justice.[3] CANS does not lightly disagree publicly with the City and the CPD, but CANS believes it essential to advise this Court of its view that the gang loitering ordinance is unconstitutional, divisive of communities along racial and generational lines, destructive of genuine community policing and ultimately likely to make Chicago neighborhoods less safe.[4]

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1. Pursuant to this Court's Rule 37.2(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members or their counsel made a monetary contribution to the preparation or submission of this brief.

2. Chicago Community Policing Evaluation Consortium, Wesley Skogan, *et al.*, eds., Community Policing in Chicago, Year Three, Nov. 1996, p. 32.

3. CANS proposals in the gang area have included the 6th District Anti-Gang Initiative, "an intensive problem-solving partnership between the CPD and the Chicago Alliance for Neighborhood Safety, funded by the US Department of Justice." *Id.*, Year Four, Nov. 1997, p. 145.

4. CANS' board of directors includes representatives from Chicago's major neighborhood-safety organizations. All but one of these representatives

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Rep. Jesse Jackson, Jr. is a Member of the U.S. House of Representatives, representing Illinois' 2nd District.

Community Renewal Society, founded in 1883, is a metropolitan Chicago faith-based organization, affiliated with the United Church of Christ, that works with churches and other community organizations to achieve economic and racial justice through programs that rebuild communities from within.

The National Association for the Advancement of Co!ored People, Inc. is the oldest and largest civil rights organization in the United States with a membership of over 500,000 and a network of more than 2,200 branches covering all 50 states and the District of Columbia. In addition to the national office, the NAACP's Illinois State Conference, the State umbrella organization of local chapters, and the Chicago Southside, the Chicago Westside and the Evanston/ Northshore branches support the Responsents as *amicus curiae.* The Black Leadership Forum, Inc. is a confederation of national civil rights and service organizations designed to promote creative leadership on civil rights and major public policy issues of significance to African-Americans. The National Council of La Raza represents more than 200 community-based organizations dedicated to reducing poverty and discrimination for Americans of Hispanic descent; its affiliates provide social services for more than two million persons throughout the United States each year. The Mexican-American Legal Defense Fund is a national nonprofit organization whose mission is to protect the civil rights of the more than 28 million Latinos living in the United States.

The Chicago Council of Lawyers is a public interest bar association, composed of approximately 1,200 lawyers, that has long been concerned with the fair and equal administration of justice. The Cook County Bar Association, the oldest bar association of lawyers of African-American heritage in the United States, has been delivering legal services to the black community since 1919. The Puerto Rican Bar Association of Illinois consists primarily of attorneys of Puerto Rican and Hispanic descent, committed to serving the legal needs of

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voted to join respondents in opposing the loitering ordinance in this Court; the Northwest Neighborhood Federation dissented.

the Hispanic community. The Chicago Conference of Black Lawyers works directly with community organizers dedicated to protecting the rights of black people in the Chicago area.

The groups listed in the margin, identified collectively as the Chicago Community Organizations, are likewise engaged directly in the effort to afford Chicago residents equal justice and safety from gangs and violence. They share in the conviction that the anti-loitering ordinance is an ill-considered, counterproductive and unconstitutional response to Chicago's serious problems of gang activity and violence.[5]

STATEMENT OF THE CASE

1. Chicago's citizens are united in their determination to combat gangs. Yet the means at issue in this case, the city's anti-loitering ordinance, has evoked substantial community opposition. The ordinance applies to any group of two or more individuals who gather "with no apparent purpose" in any public place, including streets, parks, restaurants, and any other location open to the public. Pet. App. 63a. The ordinance mandates that if a police officer reasonably believes any of the individuals to be a gang member, he shall order all of the individuals, including those not suspected of gang membership, to "disperse and remove themselves from the area"; the officer may then arrest any individual he believes to be disobeying the order. Pet. App. 61a.

City Council consideration of the ordinance was marked by intense disagreement. The *Chicago Tribune* described the proceedings as "one of the most heated and emotional council debates in recent memory."[6] Concern focused on the fact that the ordinance permits the arrest of those not suspected of gang involvement; that it could be

5. The groups are Centro Sin Fronteras and the Sin Fronteras Law Program of Chicago's West Town Neighborhood, the Chicago Coalition for the Homeless, Citizens Alert (police accountability organization), the Community Action Group of North Lawndale, the First Unitarian Society of Chicago, Illinois Caucus for Adolescent Health, PACT- Positive Anit-Crime Thrust, Inc., and the Prison Action Committee.

6. Davis, "New Police Arrest Power Lights City Council Fuse," *Chicago Tribune*, June 18, 1992, pp. 1, 14.

read to require minority youth to leave any neighborhood where police think they do not belong; that it limits gatherings not just on street corners but in a wide range of public and privately owned locations; that it restricts groups as small as two or three people; and that it applies regardless of whether any of the individuals is engaged in loud, intimidating or obstructive behavior.

The ordinance drew both support and opposition from Chicago citizens of all backgrounds. The Chicago chapter of the NAACP denounced the proposal,[7] as did the editorial page of Chicago's leading African-American newspaper, the *Chicago Defender*.[8] The city's largest newspapers likewise condemned the proposal. The *Chicago Tribune* noted that the ordinance would "invite police abuses," and concluded, "if [residents] expect that this new ordinance will make their streets safe, they are bound to be disappointed."[9] The *Chicago Sun-Times* compared supporters of the ordinance to "the likes of George III and the tyrants of Beijing" and concluded that "[t]he proposed city ordinance to ban loitering by 'known gang members' is too vague, too unworkable and, above all, too unconstitutional."[10]

Opposition to the ordinance was especially intense in the African-American community. African-American aldermen opposed to the ordinance said it was "'drafted to protect the downtown area and the white community' at the expense of innocent blacks,"[11] and that under

7. Davis & Recktenwald, "Angry aldermen target gangs," *Chicago Tribune*, October 24, 1991, p. 1.

8. Editorial, "Supreme Court Should Squash Anti-Gang Ordinance," *Chicago Defender*, April 23, 1998, p. 11 (condemning the ordinance and noting the paper's earlier editorial stands against it). The *Chicago Defender* is a general circulation daily newspaper; it has no affiliation with the Cook County Public Defender, counsel to several respondents in this case.

9. Editorial, "Anti-Gang Law Isn't the Answer," *Chicago Tribune*, May 20, 1992, p. 16.

10. Editorial, "Put Permanent Hold on Anti-Loitering Law," *Chicago Sun-Times*, May 20, 1992, p. 37.

11. Spielman, "Loitering Ban Passes," *Chicago Sun-Times*, June 18, 1992, p. 16 (remarks of Ald. John Steele).

the ordinance "you're guilty until proven innocent."[12] One African-American alderman denounced the law as "anti-American and anti-African American" and argued that the ordinance would "restrict the movement of young blacks in a manner similar to the pass laws of South Africa."[13] In the final vote, the ordinance passed with support from most of the city's white aldermen but only six of the city's eighteen African-American aldermen.[14]

The City Council hearings established community concern about gangs but also cast doubt on the need for a new ordinance to respond to them. Numerous residents had described the ability of gang members to control street corners and intimidate residents. But Deputy Superintendent Cooper, the CPD representative at the hearings, testified:

> *there are already enough laws on the books at this point.* . . . [I]n the examples that people have been giving, . . . 90 percent of those instances are actually criminal offenses where people, in fact, can be arrested.

Supp. R. II 181-82 (emphasis added).

Cooper's testimony supporting the ordinance was so tepid that one alderman finally asked him, "Bottomline, what is the CPD's position on this ordinance? Do you folks want it or would you just prefer that it not be on the books?" Supp. R. II 185. Although the CPD, as part of the City administration, was officially committed to the proposal, Cooper replied:

> Under the appropriate circumstances, the ordinance can

12. *Id.* at. 1 (remarks of Ald. Dorothy Tillman).

13. *Id.* at 1, 16 (remarks of Ald. Dorothy Tillman). Reflecting the highly emotional character of the debate, one African-American alderman even objected, "What did Hitler do to the Jews? The same thing." *Id.* at 1 (remarks of Ald. Allan Streeter).

14. Official Journal, City of Chicago, p. 18293 (June 17, 1992). Eight African-American aldermen voted no, and four did not vote. The racial identity of the opponents is noted in Spielman, "Anti-Gang Law Won't Be Abused, City Says," *Chicago Sun-Times*, June 19, 1992.

be a viable tool for the police. What I am suggesting, however, is that there is much more that can be done *rather than an additional law on the books,* and I would prefer that the — or I would rather suggest or request the City Council, in its infinite wisdom, begin to look at the totality of the problem as opposed to looking at it from a one-dimensional point of view.

Supp. R. II 185-86 (emphasis added).[15]

2. In a series of court proceedings, thirteen trial judges passed on the ordinance. Ten trial judges held the ordinance unconstitutionally vague on its face, and one held it unconstitutional as applied; only two of the trial judges upheld the ordinance.[16] On appeal, the Illinois court of appeals unanimously held the ordinance unconstitutionally vague on its face, in violation of both the Illinois and federal constitutions.

The Illinois Supreme Court unanimously affirmed. The Court noted that the ordinance, as written, would apply to many innocent activities that the City Council could not have intended to restrict, *e.g.* waiting to hail a taxi. Pet. App. 10a. The Court accordingly assumed that the ordinance's definition of "loitering" was not intended to restrain all activity falling literally within its terms. Rather, the Court held that "[t]he definition of loitering . . . provides absolute discretion to police officers to decide what activities constitute loitering." Pet. App. 15a. The Court further found that because the City Council's intent was to "craft[] an exceptionally broad ordinance which could be used to sweep these intolerable and objectionable gang members from the city streets," the ordinance was not susceptible to a limiting construction. Pet. App. 16a. The Court concluded that the ordinance was "impermissibly vague in all of its applications" (Pet. App. 7a) in violation of the due process requirements of both the Illinois (Pet. App. 6a) and federal constitutions.

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15. In light of Cooper's testimony, petitioner errs in asserting that "this record contains no evidence . . . that there were [other] means available to the City to address the problems engendered by gang loitering." Br. 27.

16. Poulos, "Chicago's Ban on Gang Loitering," 83 Cal. L. Rev. 379, 384 n. 26 (1995).

SUMMARY OF ARGUMENT

1. The Illinois Supreme Court ascertained the legislative purpose of City Council and determined that the ordinance was intentionally cast in "exceptionally broad" terms, Pet. App. 16a, so that police officers would have the power to disperse and, if necessary, arrest citizens whose behavior they consider objectionable. The Court then held that the ordinance, so construed, violates federal due process requirements. This Court has never overturned a state supreme court's judgment finding its own law impermissibly vague under these circumstances.

There is no reason to believe that the Illinois trial and appellate judges who ruled in this case are insensitive to the dangers of gang violence or unaware of practical problems that arise in prosecuting gang members under already-existing laws. Nor is there any reason to believe that these state judges felt constrained by federal precedent to invalidate an ordinance that they preferred to uphold. On the contrary, both Illinois appellate courts ruled unanimously that the ordinance violates the Illinois constitution as well.

Faced with a poorly drafted and largely incoherent legislative pronouncement, the Illinois Supreme Court made a reasonable effort to give it an intelligible meaning. The ordinance applies only to those who gather with "no apparent purpose." But if an intent to get fresh air or to observe the passing scene is a "purpose" within the meaning of the ordinance — if no interpretative gloss restricts the kinds of purposes that can qualify — then, as the Solicitor General concedes, "the ordinance would prohibit nothing at all." Br. U.S. 13. To avoid this result, petitioner suggests that an individual's "apparent purpose" must be "immediately discernible to a police officer." Br. 38. Yet, if given this gloss, the ordinance would constrain many varieties of constitutionally protected religious activity, political organizing, and other acts (*e.g.*, waiting for the chance to hail a taxi) that the City Council could not have intended to restrict.[17] And even with this gloss,

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17. Contrary to the claim of the Solicitor General (Br. U.S. 13 n.6), the Illinois Supreme Court was not ill-informed about the realities of hailing a cab in the city where it sits. On Chicago streets, many minutes can go by

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the ordinance would remain *un*available against its principal targets — known gang members who congregate to assert control over turf or to recruit new members — because these individuals have a readily discernible purpose. With or without petitioner's suggested gloss, the "no apparent purpose" language simultaneously prohibits much more and much less than the City Council could have intended. The Illinois Supreme Court accordingly concluded the "no apparent purpose" language simply served to cast a wide net, so that police officers would have discretion to decide on the spot which activities constitute the restricted kind of "loitering."

This was the correct interpretation of the ordinance and certainly not an unreasonable one. But even if this Court believes that the ordinance should have been given a narrower or more specific interpretation, that question is not one of federal law. Ascertaining legislative intent and making the prudential judgment whether to impose a narrowing construction on poorly drafted state legislation are quintessential matters of state law, on which the decision of a state supreme court is final.

The only federal question presented is whether the ordinance, *so construed,* is unconstitutional. Unless this Court is prepared to abandon the familiar *Papachristou-Kolender* standard,[18] there can be no doubt that a law is impermissibly vague when its terms leave police officers with substantive discretion to determine, without legislative or administrative guidance, which kinds of public behavior the law restricts.

2. Petitioner argues that vagueness problems are cured because

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without a taxi passing. See Hill & Downey, "Taxis Still Can Be Rare Despite Law," *Chicago Tribune*, May 24, 1998, p.1. Persons waiting to hail a cab do not constantly wave their arms in a way that would make their purpose apparent. Other *amici* make the same error, dismissing the Illinois Supreme Court's example as "nonsensical." Br. Nat'l Dist. Attorneys Ass'n 16. There is nothing nonsensical about waiting until a taxi is within sight before attempting to hail it.

18. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Kolender v. Lawson*, 461 U.S. 352 (1983).

an arrest under the ordinance must be preceded by a police order to disperse. But the unique terms of this ordinance's dispersal requirement *aggravate* vagueness problems. Contrary to petitioner's repeated assertions (Br. 11, 29, 30), it is simply not true that citizens can comply with the dispersal order merely by separating and moving on. The ordinance requires individuals to disperse *and* "remove themselves from the area." Pet. App. 61a. Even when individuals disperse and move on, they have no way to know how far they must go or how long they must remain away to avoid arrest. We have found no other law granting — and no judicial decision ever sustaining — any comparable police power to exercise spatial control over movement within a city.

3. At no time in the past twenty-six years has this Court or any state supreme court ever countenanced a law granting police the degree of untrammeled discretion that results from petitioner's concededly "novel" (Br. U.S. 28 n.19) ordinance. Implicitly recognizing the unprecedented nature of their claims, petitioner and several of its *amici* urge this Court to modify or abandon the *Papachristou-Kolender* standard. They argue that new conceptions of community policing and alleged improvements in the voting power of minorities render obsolete the traditional due process limits on police discretion to set substantive standards of behavior. Br. 15; Br. CNO 6, 9-14.

These radical arguments lack both legal and factual foundation. Due process cannot mean one thing when a minority group opposes loitering laws and a different thing when such a group allegedly favors them. *Cf. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) ("the standard of review . . . is not dependent on the race of those burdened or benefited"). In any event, most of Chicago's African-American aldermen did *not* support the ordinance.[19] And the

19. One group of petitioner's *amici* claims that Chicago's "minority communities" supported the ordinance and that it was enacted "at the behest of those very citizens." Br. Chicago Neighborhood Organizations [hereafter CNO] pp. 5, 14. Though the identity of supporters and opponents of legislation is not relevant to the validity of a constitutional challenge, these claims are in any event incorrect. The Northwest Neighborhood Federation (a diverse group based in a predominantly white section of the city) initiated the proposal, *see*
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leading proponents of community policing, including those cited and selectively quoted by petitioner itself, all stress the continuing importance of restraints on police discretion, including in particular the need to restrict police "sweeps" under broad anti-loitering laws. See Part IV, *infra*. Petitioner and its *amici* offer no justification for abandoning traditional due process principles, and make no showing that courts could manage the complex inquiries into minority-group preferences that would be necessary under the sliding-scale constitutional test that petitioner's *amici* propose, Br. CNO 13, as a replacement for the *Papachristou-Kolender* standard.

4. The undersigned *amici* fully share petitioner's objective of combating gang violence. But without disregarding settled due process limits, cities have a wide range of workable options, including traditional law enforcement (stops on founded suspicion and arrests on probable cause for criminal gang activity, intimidation, obstructing the public way, and other existing public-order offenses)[20] as well as the kind of cooperative neighborhood problem-solving efforts that constitute genuine community policing.[21]

Petitioner's claim that traditional due process limits must be

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Supp. R. II 30-32; it was "drawn up by several white aldermen and enthusiastically endorsed by Mayor Richard Daley." *Davis, supra* n. 6.

To demonstrate an alleged preference for the ordinance in the African-American community, petitioner's *amici* refer to a recent City Council resolution that passed with support from aldermen representing eight predominantly African-American wards. Br. CNO 15. But in the formal vote enacting the ordinance, the African-American aldermen split 8-6 against it, and the recent resolution of support was adopted under a suspension of City Council rules, apparently without notice or debate, with eleven African-American aldermen opposed, absent or not voting. City of Chicago, Official Journal, May 20, 1998, pp. 70134-35. The record is clear that support for the ordinance has been sharply divided and that this law has never commanded the support of a majority of the city's African-American aldermen.

20. *E.g.*, Ill. Stat. ch. 720 § 5/12-6.2 (intimidation for the purpose of furthering gang activities); § 570/405.2 (criminal street gang drug conspiracy).

21. See H. Goldstein, Problem-Oriented Policing (1990); G. Kelling & C. Coles, Fixing Broken Windows (1996).

suspended because neighborhood residents are too intimidated to testify in court about actual misbehavior, Br. 3, deserves little comment. In addition to standard police methods of surveillance and undercover observation, a citizen-witness's 911 call, stating that he has observed criminal behavior and describing the perpetrator, unquestionably is sufficient by itself to establish probable cause for arrest;[22] a fortiori, an officer can give a suspect the choice of moving on or facing arrest for the offense reported, without any need to consider whether the suspect was "loitering." And police can assure citizens of the complete confidentiality of such reports, even when the issue of probable cause must later be litigated. *McCray v. Illinois*, 386 U.S. 300 (1967). Nothing in the record or in the legislative findings of City Council offers support for petitioner's claim that police must have unchanneled discretionary authority to disperse and, if necessary, arrest individuals who have given no grounds for suspicion of any misbehavior whatever.[23]

The legitimate desire to combat gangs and to encourage effective policing strategy creates no need to suspend settled principles of due process, and it affords no justification for condemning the Illinois appellate judges who unanimously concluded that due process was violated by the unique terms of this Chicago ordinance.

22. Y. Kamisar, *et al.*, Modern Criminal Procedure 196 (7th ed., 1990).

23. The argument that innocent citizens must be dispersed to protect them from being caught in gang cross fire (Br. 37, Br. U.S. 29-30 n.20) likewise deserves little comment. Once police have ordered the suspected gang member to move on, the other individuals in the group are no safer (and might be less safe) if they disperse with him than if they simply remain where they are while he leaves. Neither petitioner nor the City Council has asserted that the risk of getting caught in gang cross fire creates any need to disperse groups *not* containing a suspected gang member.

ARGUMENT

I.

THE ORDINANCE'S DEFINITION OF LOITERING IS IMPERMISSIBLY VAGUE ON ITS FACE.

"The void-for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). In addition, the vagueness doctrine requires that the offense be defined "in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* The Chicago ordinance is impermissibly vague on both grounds. In none of its conceivable applications does it provide fair notice to citizens or sufficient guidance to prevent arbitrary enforcement.

Petitioner insists that the term "loiter" has a readily understood meaning. Br. 30. Yet courts uniformly hold that when statutes prohibit loitering, without requiring proof of other elements, they are void for vagueness.[24] The reason is that the concept of "loitering" is either too subjective or too broad to identify prohibited conduct with reasonable definiteness.

The ordinary meaning of loitering is inherently subjective. "Loitering" is a pejorative term, signaling disapproval of the activity or the actor. When two senior citizens spend an evening chatting on a park bench, their neighbors would not speak of them as "loitering." But those neighbors would readily apply that label to teenagers from outside the neighborhood or other "undesirables" engaging in precisely the same conduct. A statute is void for vagueness if it proscribes conduct "annoying" to others (*Coates v. City of Cincinnati*, 402 U.S. 611 (1971)), even though the word "annoying" has a well understood meaning. For the same reason, the term loitering, as used in everyday conversation, is unacceptably vague for penal law purposes, even if observers of similar age and social background would agree about which activities deserve that label. The meaning of the word is determined by the personal sensibilities of the observer.

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24. *E.g., State v. Richard*, 836 P.2d 622 (Nev. 1992); *Farber v. Rochford*, 407 F. Supp. 529 (N.D. Ill. 1975).

Statutes that define loitering as standing or strolling "with no apparent purpose" seek to eliminate the overtly subjective element, but they then cover so many innocuous activities that they do not identify prohibited conduct at all. Courts uniformly and properly hold such statutes unconstitutional. As a recent FBI publication notes, "courts routinely have held that broadly worded vagrancy and loitering statutes that do not target other unlawful conduct are unconstitutional."[25] Without some additional element or narrowing construction, loitering — so defined — is inherently overbroad, not only in the sense that it can apply to constitutionally protected conduct, but also in the sense that, taken literally, it reaches activity that the legislature clearly had no desire to condemn. Such breadth of apparent coverage renders the statute *vague*, because the statutory terms afford no basis for distinguishing between conduct that remains permissible and conduct that the law is intended to proscribe.

Papachristou makes this point clear. This Court expressly held that "[t]he qualification 'without any lawful purpose or object' may be a trap for innocent acts." 405 U.S. at 164. Similarly, referring to another provision of the Jacksonville ordinance, this Court said that persons "'habitually . . . frequenting . . . places where alcoholic beverages are sold or served' would literally embrace many members of golf clubs and city clubs." *Id.* Unconstitutional vagueness resulted not from lack of meaning in the words themselves but from the implausible breadth of their coverage. This Court did not hold that a legislature *could not* make this conduct a crime;[26] it simply recognized that Jacksonville obviously *did not*. In such cases, the legislature has impermissibly "set a net large enough to catch all possible offenders." *United States v. Reese*, 92 U.S. 214, 221 (1875). In effect:

> Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense. In

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25. Regini, "Combating Gangs: The Need for Innovation," FBI Law Enforcement Bulletin, February 1998, p. 27.

26. Legislatures have unquestioned power to regulate bars and to prohibit the consummation of alcohol. E.g., *California v. LaRue*, 409 U.S. 109 (1972).

> short, these 'vagrancy statutes' and laws against 'gangs' are not fenced in by the text of the statute or by the subject matter so as to give notice of conduct to be avoided.

Winters v. New York, 333 U.S. 507, 540 (1948) (Frankfurter, J., dissenting).

The Chicago ordinance suffers from the same flaws; its definition of loitering offers no basis for distinguishing between conduct that the City Council intended to restrict and conduct that it intended to leave unfettered. Indeed, though petitioner and its *amici* insist that loitering has a perfectly clear meaning, they are unable to offer a single internally consistent explanation of what the ordinance covers. If, as petitioner insists, members of a religious group who gather at a street corner and wait for a chance to recruit new members cannot be dispersed, because they have an "apparent purpose" (Br. 20), then the ordinance is likewise inapplicable to gang members who gather at a street corner and wait for an opportunity to recruit new members. A group's purposes are just as likely to be apparent in one case as in the other. And neither the state nor the City has made it unlawful for gang members to noncoercively recruit new associates.[27]

As written, therefore, the ordinance affords no basis for distinguishing between the organizational activities of various groups. Either it requires officers to disperse Jehovah's Witnesses, Jews for Jesus, and Neighborhood CrimeWatch members who gather on street corners to recruit (when any participant is a suspected gang member), or it does not permit officers to disperse Gangster Disciples who gather on street corners to recruit. Neither interpretation makes much sense or accords even roughly with the City Council's evident intentions. Compare Pet. App. 60a-61a.

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27. Compare Ill. Stat. ch. 720 § 5/12-6.1, prohibiting the use of unlawful means to compel a person to join any organization. The behavior that most concerned the City Council — the "visibly lawless" behavior that petitioner repeatedly invokes (Br. 9-10, 12, 14, 16, 27, 44) — is left unrestricted by the ordinance as written, because the purpose of such behavior is apparent. When gang members obstruct the sidewalk or intimidate residents their conduct is addressed by other laws, but the loitering ordinance appears inapplicable and offers no additional tool for prosecuting such cases.

These anomalies could be avoided by assuming that the ordinance contemplates a selective determination of which "apparent purpose[s]" count. Yet neither the ordinance nor the implementing General Order offers any standard for making selective judgments about different "apparent purpose[s]." In fact, petitioner takes flatly contradictory positions on the question whether the "apparent purpose" inquiry can be selective. At one point petitioner suggests that persons "who are merely sitting on a park bench [or] chatting on a sidewalk" are subject to the ordinance (Br. 38); apparently, a readily apparent purpose to sit, chat, or engage in "mere casual social interaction" (Br. 10) does not count. At another point, however, petitioner appears to insist that any apparent purpose can qualify, a position that drives it to the astonishing conclusion that "[u]nder the ordinance, gang members remain free to . . . solicit contributions for their gangs" because this conduct "has an 'apparent purpose.'" Br. 27. Petitioner's view — that gang members are free to gather at street corners and politely ask each passing citizen to give five dollars to their gang — would surely surprise City Council supporters of the law. Indeed petitioner's interpretation, if sound, renders the ordinance virtually unenforceable — that interpretation apparently permits gang members congregating on a street corner to avoid arrest simply by wearing lapel buttons saying, "This is our turf," or "Give generously to the Gangster Disciples."[28]

Some of petitioner's examples suggest a different rule of interpretation: that productive purposes qualify, but that purposes to remain idle or to talk informally for reasons of rest or recreation do not.[29] That interpretation likewise creates untenable anomalies. It

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28. No doubt there are cases in which teenagers approached by the police say they were "doing nothing." They presumably mean they were doing nothing *wrong*; few would realize that this response puts them in jeopardy under the ordinance. If a teenager's "doing nothing" statement constitutes an admission of "loitering," the ordinance sets an especially effective trap for the unwary.

29. *See* Br. 10, stating that "mere casual social interaction" cannot count as a qualifying purpose. Partly contradicting this approach, petitioner declares that not all social purposes will be treated equally; a purpose to play basketball allegedly qualifies as an "apparent purpose" but a purpose to chat with a friend does not. Br. 38. One can readily imagine borderline cases — merely watching

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means that the ordinance would not reach conduct that the City Council surely hoped to cover (*e.g.*, gang efforts to control territory and recruit new members, see Supp.R.II at 32). At the same time, the ordinance *would* cover much conduct that the City Council presumably did *not* intend to reach. If casual purposes cannot count, then there is "loitering" when two sweethearts stand holding hands at a street corner after school, when three boys stand outside a movie theater discussing which show to see, when four teenagers stand across the street from their school waiting until the end of lunch hour, or when two senior citizens sit on a park bench chatting with their teenaged grandson. The ordinance, as written, would *require* a police officer to order these citizens to separate from one another and leave "the area" whenever one of them is reasonably believed to belong to a gang.

In observing that such activities are "innocent" (Pet. App. 9a), the Illinois Supreme Court never suggested that such activities are immune from regulation. Here, as in *Papachristou,* the problem is not that a legislature *could not* condemn such activities but simply that it *did not* — that the legislature could not have intended to restrict such activities and that the language enacted *"fails to distinguish* between innocent conduct and conduct calculated to cause harm." Pet. App. 9a (emphasis added).

As a result, the Chicago ordinance simply casts a wide net without identifying which activities the legislative body intended to reach. Such an ordinance "does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat." *Cox v. Louisiana*, 379 U.S. 536, 579 (1965) (opinion of Black, J.). By authorizing police action against whichever kinds of idle behavior police view with disapproval, the Chicago ordinance is for practical purposes identical to the ordinance condemned in *Coates*, providing an "obvious invitation to discriminatory enforcement against those whose association together is 'annoying.' " 402 U.S. at 616.

(Cont'd)
the basketball game might not qualify as a permissible purpose, or perhaps watching the game would qualify but merely talking about basketball would not. But the fundamental problem is more basic: even in core situations, the application of the ordinance is inevitably debatable.

The ordinance also threatens core First Amendment interests. If casual social interaction cannot count as an "apparent purpose," the ordinance then applies to the politician or would-be politician who chats casually with neighborhood residents, in periods between formal campaigns, with the unstated goal of building rapport with potential voters. Yet if the ordinance does not apply in this situation, it provides no standard for determining which casual social conversations constitute loitering and which do not.[30] And these difficulties of interpretation do not arise only at the margins. In every imaginable example, the ordinance requires police to make substantive policy judgments in order to avoid the odd results that would follow from applying its terms literally. The Illinois Supreme Court clearly was correct in holding that the ordinance sets no intelligible standard and in effect simply delegates "absolute discretion to police officers to decide what activities constitute loitering." Pet. App. 15a.

The Illinois Supreme Court also considered narrowing the reach of the ordinance, but determined that a limiting or clarifying interpretation would be inconsistent with the legislative purpose because:

> city council's intent . . . is clear and unambiguous. The city has declared gang members a public menace. . . . Accordingly, the city council crafted an exceptionally broad ordinance which could be used to sweep these intolerable and objectionable gang members from the city streets.

Pet. App.16a.

The court therefore concluded that the ordinance's broad, unspecified conception of loitering was "not reasonably susceptible to a limiting construction." *Id.*

Faced with similar situations, this Court has frequently refused

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30. In the case of a known politician, police might decide that a casual social interaction with constituents qualifies as an "apparent purpose," but they would be much less likely to reach that conclusion in the case of someone they do not recognize as a political contender. Discrimination against political novices and outsiders is inherent in the "apparent purpose" inquiry.

to narrow a federal statute by making policy choices that Congress has ducked. *E.g.*, *United States v. Cardiff*, 344 U.S. 174 (1952). The Illinois Supreme Court chose the same path here, concluding that the legislative intent precluded judicial efforts to limit the ordinance's broad and uncertain reach.[31]

Lacking any such limiting construction, the ordinance is clearly void on its face, because in every situation it requires police to exercise unguided discretion to determine whether the conduct in question constitutes loitering. And, as the Illinois Supreme Court recognized, the General Order promulgated by the CPD does nothing to cure this problem, because the General Order makes no attempt to clarify what is meant by "loitering." *See* Pet.App. 64a-73a.

II.

THE INDETERMINACY OF THE TERM "LOITERING" IS NOT CURED BY THE REQUIREMENT THAT POLICE HAVE A REASONABLE BELIEF THAT ONE PERSON IN THE GROUP IS A GANG MEMBER.

In the context of Chicago's ordinance, the gang membership element does nothing to meet the *Papachristou-Kolender* requirement of adequate limits on law enforcement discretion. As we have discussed, the ordinance and the General Order provide police officers untrammeled discretion to determine which activities constitute loitering. And even when limited to groups that include a suspected gang member, the ordinance requires the exercise of unguided discretion to determine its scope. It provides no standard for determining when a probable gang member may stand with others watching a ball game in a park or wait with his sister for a chance to

31. The Solicitor General dismisses as "incorrect" the Illinois Supreme Court's understanding of the City Council's legislative purpose. Br. U.S. 26. This argument is simply not open for consideration in this Court. "[L]egislative intent is a matter of state law, on which the highest court of a state speaks with finality." *Della Grotta v. Rhode Island*, 781 F.2d 343, 347 (1st Cir. 1986). The same error is fatal to another *amicus*'s claim, in dismissing the Illinois court's view of the ordinance's purpose, that "[t]he evident purpose of the Chicago ordinance may be gleaned from its plain language." Br. Los Angeles County 14.

hail a taxi. It provides no standard for determining whether an aspiring politician may chat casually with a group in which the probable gang member is standing, or whether the gang member's own mother may sit with him on a park bench or stand outside with him on a hot night. Plainly, as the Illinois Supreme Court held, the ordinance contemplates the need for police discretion to determine on the spot which activities constitute the restricted kind of loitering.

It is true that this discretion can be deployed only in certain areas (*undisclosed* areas) of the city,[32] and only against some of the population — those who come in contact with suspected gang members. Petitioner in effect argues that discretion to determine allowable forms of public behavior is sufficiently limited if it can be deployed only in certain neighborhoods or only against certain classes of innocent people, people who are not themselves suspected of gang membership or any misbehavior. Yet this Court has never before suggested that it would uphold an ordinance that "does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat," *Cox*, 379 U.S. at 579 (opinion of Black, J.), on condition that this form of government be placed in effect only in designated but undisclosed sections of a city.[33] The Illinois Supreme Court should not be faulted

32. Letter dated July 8, 1998, from Counsel for Petitioner to Counsel for Respondents, indicating that areas designated for enforcement of the ordinance are not publicly available and will be disclosed, if at all, only in response to a party's discovery demand in litigation. The Solicitor General appears to be misinformed on this point. The Solicitor General asserts that citizens "may stand wherever they wish in areas of the city not designated by the general order." Br. U.S. 24. The designation procedure affords no such opportunity, because the location of the designated areas remains a closely guarded secret.

33. It is not amiss to mention the implications of this view for the minority youth of our nation. In cities where police lists of probable gang members have been analyzed, substantial portions of the city's African-American youth appear on such lists. In Los Angeles, 47% of the city's African-American youth, and in Denver 67% have been placed on police lists of probable gang members. Stolberg, "150,000 Are in Gangs, Report by D.A. Says Half of Young Blacks Are Members," *Los Angeles Times*, May 22, 1992, p. 1; Johnson, "2 out of 3 Young Black Men in Denver Listed by Police as (Cont'd)

for concluding that all segments of Chicago's law-abiding population have the same right to be governed by ascertainable law.

III.

THE VAGUENESS OF THE ORDINANCE IS NOT CURED BY THE REQUIREMENT THAT POLICE GIVE GROUP MEMBERS AN OPPORTUNITY TO DISPERSE.

Petitioner argues that vagueness problems are cured because an arrest under the ordinance must be preceded by an order to disperse. But a dispersal order does nothing to address the danger of arbitrary enforcement; indeed petitioner concedes as much: "if police officers are afforded standardless discretion to order individuals to move on, the mere fact that a police order is given does not serve to sustain the order." Br. 32.

Standardless discretion is precisely what the ordinance gives Chicago's police, as we have shown. But even if the preconditions for issuing a dispersal order were precise, the ordinance would still be vague, because the terms of the dispersal requirement are fatally ambiguous.

Petitioner asserts repeatedly that under the ordinance "people are told precisely what they must do to avoid arrest," and that "no one could fail to understand what is required of him," because the ordinance merely requires individuals to obey a police order to "disperse" or to "move on." Br. 11, 29, 30. This characterization of the ordinance is incorrect. Both the ordinance and the General Order require an arrest unless the members of the group promptly disperse *and* "remove themselves from the area." Pet. App. 61a, 72a.

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Suspected Gangsters," *NY Times*, Dec. 11, 1993, p. A8. As a result, virtually any group of inner-city minority youth is likely to contain at least one person whom police consider a gang member. For these youth, the right to stand on the street will therefore exist "only at the whim of any police officer of the city," *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965) (or technically, any officer designated to enforce the ordinance), provided only that the group is considered to be "loitering."

Far from curing the vagueness of the other sections of the ordinance, the obligation to leave "the area" introduces additional vagueness. As the Illinois court of appeals noted, "[t]he ordinance and general order are also completely silent as to exactly how fast and how far the persons have to disperse in order to avoid arrest." Pet. App. 32a-33a. Yet petitioner's brief offers no defense of the ordinance's leave-the-area requirement.[34]

Kolender v. Lawson, *supra*, makes clear that a police order to leave "the area" is fatally vague. *Kolender* involved a California statute providing penalties for any person who "loiters or wanders . . . without apparent reason . . . and refuses to identify himself . . . when requested to do so . . . ." 461 U.S. at 353 n.1. In *Kolender* the California courts had narrowed the loitering provision by holding that an officer could request identification only when he had "reasonable suspicion of criminal activity sufficient to justify a *Terry* detention." *Id.*, 356. The state courts had also ruled that the identification provided by the suspect had to be "credible and reliable." This Court assumed that the *Terry* suspicion standard adequately guided the officer's discretion whether to request identification but nonetheless ruled the California law void on its face, because it "contains no standard for determining what a suspect has to do in order to satisfy the [identification] requirement." *Id.* 358.

The same vagueness problem arises in more acute form here. The Chicago ordinance applies to innocent citizens not suspected of illegal conduct or gang membership; as we have shown, it contains no standards for determining when a dispersal order can be issued; and it contains no standard for determining how far an individual must go or how long he must remain away in order to comply with the order. Nor is any such standard to be found elsewhere in Illinois law. To the contrary, Illinois precedent warns that "[s]tanding alone the word 'area' [in a statute] implies nothing as to size. It may be of large or small extent." *Illinois Cent. R. Co. v. Village of South Pekin*,

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34. That requirement is nowhere mentioned in petitioner's brief, except where the brief sets out the full text of the ordinance. Br. 4. The vagueness of the leave-the-area requirement was a ground of decision in the Illinois court of appeals, and respondents expressly argued the issue in the Illinois Supreme Court, Br. Resp. Ill. S. Ct. 46-47. As one group of petitioner's *amici* recognizes, the issue is properly before this Court. Br. Nat'l Dist. Attorneys Ass'n., *et al.* 24.

374 Ill. 431, 435, 29 N.E. 2d 590, 593 (1940). The leave-the-area requirement thus *adds* uncertainty for citizens seeking to comply with the law and provides a layer of added discretion for officers who are authorized to decide with no guidance whether an individual has left "the area." Even when a group has dispersed and begun to move away, each individual remains subject to arrest if he fails to move far enough, or returns to "the area" too soon.

The puzzling arrest statistics reported by the CPD seem less surprising in this light. From 1992 until 1995, police issued 85,197 orders to disperse, and in 49% of these cases, police decided that individuals were disobeying their orders; 41,740 individuals were arrested.[35] If the order to disperse is as clear and easy to satisfy as petitioner claims, such a high rate of noncompliance is inexplicable. It is not likely that so many young gang members were defiantly defending their "turf" against armed officers, or that they welcomed the chance to spend time in Cook County Jail. Common sense suggests that many of these young persons wanted to avoid arrest but failed in their efforts to comply. The obligation to leave an unspecified "area" is so ambiguous that it "creates a trap for the wary as well as the unwary." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991) (opinion of Kennedy, J.).

Chicago's leave-the-area requirement appears to be unique. The great majority of relevant state laws authorize only a police order to disperse or move on.[36] A few state laws authorize orders with some spatial component, such as orders to "depart" or "leave." But in all the examples we have found, such orders to leave can be issued only under narrowly defined circumstances such as riot or accident.[37] Such

35. Gillis & Spielman, "City's Loitering Law Ruled Unconstitutional," *Chicago Sun-Times*, Dec. 19, 1995, p. 3.

36. Among the forty-one "State Dispersal Laws" cited by *amici* Ohio, *et al.* (Br. Ohio A-4 to A-8), thirty-three authorize only an order to "disperse," "move" or "move on"; the only cited laws with a spatial component ("depart," "leave" or "withdraw") are those of Georgia, Illinois, Massachusetts, Michigan, Minnesota, New Hampshire and Wisconsin, while Ohio's statute requires obedience to any "lawful order." See *id.*, and statutes there cited.

37. The Ohio statute, for example, applies only in cases of "fire, accident, (Cont'd)

orders automatically acquire content by reference to the emergency itself; a law-abiding person can readily understand the expectation that he move out of sight and earshot.

Here, in contrast, there is no indication that moving out of sight of a particular street corner would constitute leaving "the area." If the "area" concept has any content, in the present context, it *might* mean leaving "the neighborhood," a locale that is not only vague but also, in Chicago, closely tied to race and ethnicity.[38] A law authorizing police to order strangers back to their own neighborhood would make all-too-real the concerns of Chicago aldermen who compared this ordinance to South Africa's pass laws.[39] In the Chicago setting, such a law could not easily survive equal protection scrutiny, and petitioner does not suggest that the "area" concept should be so understood. Yet if an "area" cannot be equated with a neighborhood, it remains totally unclear what its limits are or what criteria might be used determine them.

No decision of this Court, or of any state court we have discovered, has ever permitted any comparable police power to exercise spatial control over movement within a city. *Cox v. Louisiana*, 379 U.S. 559 (1965), where this Court reversed a conviction for demonstrating "near" a courthouse, offers an instructive contrast. The Court assumed that the term near "may not [be] unconstitutionally vague, at least as applied to a demonstration within the sight and hearing of those in the courthouse." In reaching that conclusion, the Court stressed that the statute permitted "a degree of on-the-spot administrative interpretation" and held that "[t]his administrative discretion to construe the term 'near' concerns a limited control of the streets and other areas in the immediate vicinity of the courthouse

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disaster, riot or emergency." *Id.* A-7. Each of the other state statutes authorizing an order to depart or leave is similarly limited. See *id.* A-5 to A-8 and statutes there cited.

38. *See* D. Massey & N. Denton, American Apartheid 76 (1993) (noting that by most measures Chicago is the most or second-most highly segregated city in America).

39. *See supra* note 13 and accompanying text.

and is the type of narrow discretion which this Court has recognized as . . . proper." *Id.* 568-69.[40] No comparable measuring rod is implicit in the Chicago ordinance. It applies at numerous undisclosed locations, is not limited to the immediate vicinity of any point, and does not contemplate any on-the-spot guidance to indicate what the citizen must do to comply.

Such an ordinance is void on its face because it is vague in all its applications. It is true that a citizen who stands his ground cannot plausibly claim to have left the area. But *Kolender* presented the same question. As Justice White argued there in dissent (461 U.S. at 472), the *Kolender* statute was clear as applied to the defiant citizen who refused to provide any identification. This Court considered Justice White's example irrelevant to a facial challenge. As *Kolender* holds, due process requires that laws, however ambiguous at their edges, offer some safe harbor for the law-abiding citizen who seeks to comply. In the *Kolender* setting there were no objective standards the officer could apply, once identification was offered, to determine whether it was "credible."

The Chicago ordinance poses the same problem, in more acute form. Short of fleeing the jurisdiction, the person who tries to comply has no way to know how far he must go or how long he must remain away in order to avoid arrest.[41] Independent of every other vagueness problem, the leave-the-area requirement violates *Kolender*'s principle

40. All of this Court's decisions emphasize comparable limitations. *Grayned v. City of Rockford*, 408 U.S. 104 (1972), held that a law prohibiting noise in any area "adjacent" to a school was not vague because "there must be demonstrated interference with school activities." *Id.* at 114. *Colten v. Kentucky*, 407 U.S. 104 (1972), held that a police order was not vague where it required Colton to leave a place where police were investigating a traffic violation and where conviction required "the intent of causing inconvenience, annoyance, or alarm." *Id.* at 110. *Boos v. Barry*, 485 U.S. 312 (1988), upheld a law prohibiting demonstrations within 500 feet of an embassy. In all such cases the spatial scope of the legal requirement is readily ascertainable.

41. One option would be for him to go home, but if his home is his only safe harbor, then the ordinance in effect permits the police to impose house arrest without trial, for an indeterminate period, on any citizen found in public with a person reasonably believed to be a gang member. Petitioner has not attempted to defend the ordinance on this basis.

that a police officer's order must have ascertainable content and afford the citizen a reasonable opportunity to comply.

IV.

THE *PAPACHRISTOU-KOLENDER* STANDARD SHOULD NOT BE DILUTED OR DISCARDED.

To date, judicial and scholarly opinion has been virtually unanimous in concluding that the Chicago ordinance is unconstitutional under existing precedent.[42] Accordingly, one group of petitioner's *amici* seek to win reversal by convincing this Court to "reserve" the *Papachristou-Kolender* standard for cases in which a court finds a law's impact to be "concentrated on a politically disempowered minority." Br. CNO 6. In other cases, they argue, this Court should replace existing principles with a sliding scale of review that would "depend on how widely the burden of that law is likely to be felt" (*id.* 9), taking into account such factors as "the relationship between the supporters of the law and those to whom it is being applied." *Id.* 13.

This approach is unsound both in theory and practice. The due process right to be governed by comprehensible law is a privilege of all citizens, regardless of race;[43] standards of constitutional review are "not dependent on the race of those burdened or benefited." *City of Richmond v. J.A. Croson Co.*, 488 U.S. at 494. And these *amici* do not indicate how courts could manage the elaborate factual and political inquiries that their sliding-scale approach would require.[44]

42. Berg, "The Troubled Constitutionality of Antigang Loitering Laws," 69 Chi. Kent L. Rev. 461, 485 (1993); Poulos, *supra* n.16, at 409; Livingston, "Police Discretion and the Quality of Life in Public Places," 97 Colum. L. Rev. 551, 622 (1997).

43. *Connally v. General Constr. Co.*, 269 U.S. 385 (1926); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

44. These *amici* also fail to explain why their own test would not require especially strict scrutiny in the present case, given the level of opposition to the ordinance among Chicago's African-American aldermen. See *supra* notes 13-15 and accompanying text.

Petitioner is less specific in describing the new constitutional test it seeks, but it nonetheless urges this Court to relax the *Papachristou-Kolender* standard on the ground that "commentators have repeatedly called for courts to provide greater leeway for state and local governments to address signs of chronic disorder on the streets." Br. 15.

Petitioner misapprehends the thrust of this academic literature; the critique of state caselaw that these commentators voice is important but narrow. These commentators condemn broad laws against loitering and reserve their criticism for judicial decisions that sometimes misapply *Papachristou-Kolender* by requiring overly strict proof of criminal intent or other elements that modern laws use to ensure clarity in laws against loitering.[45] Far from questioning the *Papachristou-Kolender* standard, the leading proponents of community policing all emphasize the importance of continuing to limit police discretion to set substantive standards of acceptable public behavior.

Professors Kelling and Coles make this point emphatically. They note that their "broken windows" thesis was often *misinterpreted* as an invitation to sweep unwanted persons from the streets:

> In fact, the ideas presented in 'Broken Windows' were antithetical to the use of 'streetsweeping' tactics targeted on 'undesirables'; rather, they advocated close collaboration between police and citizens, including street people, in the development of neighborhood standards. . . . [Yet] the distinction between order maintenance and 'streetsweeping' was not always apparent to police . . . . One attempt at implementing an order-maintenance approach conducted in Chicago in 1982 used police officers brought in on overtime assignments to sweep through troubled areas and arrest youths congregating on streets. *While these sweeps may have been directed against disorder, they did not constitute order maintenance of the ilk Wilson and Kelling had in mind in 'Broken Windows'* . . . . Clearly, all police actions involved in order maintenance would have to be grounded in law and subject

45. See Livingston, *supra* n.42, at 612-13, 621-26.

> to clear constitutional constraints against infringement of individual liberties.[46]

The other proponents of community policing cited by petitioner stress similar concerns. Wesley Skogen specifically criticizes a Newark police operation in which:

> groups of four or more persons 'congregating to create a public hazard' (in the words of the state statute) were first warned by officers . . . that they were required to disperse. A few minutes later, vans and squad cars descended on the area to search and arrest those who failed to heed the warning.[47]

Though Newark's law was notably narrower than Chicago's (requiring proof of a purpose "to create a public hazard"), Skogan nonetheless concludes that Newark's sweeps were "of doubtful legality"[48] and stresses that "[n]o lawyer committed to traditional constitutional conceptions . . . would regard the [Newark] sweeps as anything but unlawful."[49]

This continuing consensus against broad anti-loitering laws reflects, among other concerns, an awareness that tension in relationships between police and segments of minority communities

46. Kelling & Coles, *supra* n.21, at 22-23.

47. W. Skogan, Disorder and Decline 111 (1990).

48. *Id.*

49. P. 165, quoting J. Skolnick & D. Bayley, The New Blue Line 199 (1986). Livingston likewise condemns loitering laws that "devolve[ ] law-making authority on the police" (Livingston, *supra* n.42, at 628), and argues only that courts should uphold laws that regulate "loitering without legitimate purpose about certain narrowly specified and especially vulnerable places of generally restricted access (like schools . . .)" *Id.* at 639. She insists that loitering laws must not be "aimed at excluding outsiders from full participation in the community" (*id.* at 647), and must provide for continuous monitoring of the law's impact on disfavored groups. *Id.* at 653-67. Even under her approach, Chicago's ordinance must fall, as Livingston herself appears to acknowledge. *Id.* at 622, 667-68.

remains acute. James Q. Wilson, who with Kelling originated the "broken windows" thesis, cautions:

> We are at mid-stream in our efforts to produce a society in which whites and blacks can live together decently well. Such a transformation is still decades away, and in this time there will be more riots, more suspicion, and more political manipulation. The vast gains that African Americans have made . . . coexist with a deep layer of anger, distrust, and confusion.[50]

Similarly, police experts Hubert Williams and Patrick Murphy note:

> [A]lthough the police are better prepared to deal with the residents of the inner city than they were twenty years ago, they are far from having totally bridged the chasm that had separated them from minorities — especially blacks — for over 200 years. There are still too few black officers, at all levels. Racism still persists.[51]

Progress in race relations, though undeniable, is simply not relevant to the allowable vagueness of statutory language, nor in any case is it sufficient to support the radical change in constitutional doctrine that petitioner and its *amici* seek.

* * * *

Like all Chicago residents, the undersigned *amici* and their members live with crime on a daily basis and want effective protection from gang intimidation and violence. But all citizens have the right

50. James Q. Wilson, "The Closing of the American City," *The New Republic*, May 11, 1998, pp. 30, 38.

51. Hubert Williams & Patrick V. Murphy, The Evolving Strategy of Police: A Minority View, in Perspectives on Policing, No. 13 (U.S. Dept. of Justice, Nat'l Institute of Justice, Jan. 1990). Similarly, former New York City Police Commissioner William Bratton warns: "As police leadership has accepted responsibility for reducing crime and fear, so too must it accept responsibility for dealing with racism, brutality, and inappropriate attitudes in the ranks. The first step is to admit there is a problem." William Bratton, Turnaround 312 (1998).

to be governed by understandable laws that include reasonable standards to prevent arbitrary enforcement. Petitioner has made no showing that its laudible goals cannot be achieved by a number of straightforward expedients — including enforcing existing laws, as Deputy Superintendent Cooper urged from the outset, or, if need be, authorizing police officers to order individuals to move on, regardless of whether they are "loitering," whenever there is probable cause to believe that they are obstructing sidewalks, intimidating others, or conspiring to advance criminal activities. Petitioner has offered no convincing reason why its police must be permitted broad discretion to control the "casual social interaction" (Br. 10) of law-abiding citizens, including those not remotely suspected of gang involvement. Petitioner has established no need to suspend the settled due process principles which clearly render its vague regulation of "loitering" unconstitutional.

CONCLUSION

The judgment of the Illinois Supreme Court should be affirmed.

Respectfully submitted,

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